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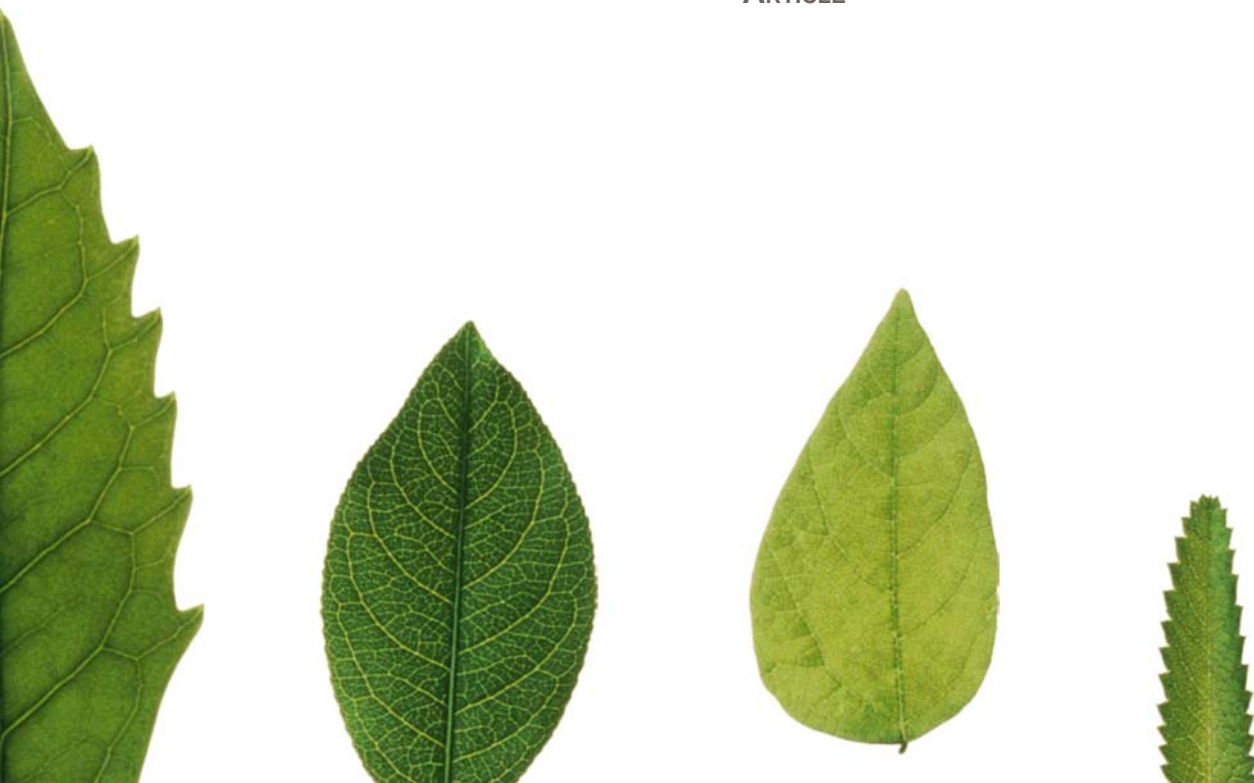
LEAD

INDIGENOUS PEOPLE AND CUSTOMARY LAND OWNERSHIP UNDER DOMESTIC REDD+ FRAMEWORKS: A CASE STUDY OF INDONESIA

Glen Wright

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1

INTRODUCTION

Deforestation is an immense, complex and multifaceted problem. Deforestation and forest degradation are estimated to be responsible for approximately fifteen percent of global emissions of carbon dioxide (CO₂).¹ The effective mitigation of climate change through the stabilisation of atmospheric greenhouse gas concentrations is unlikely without addressing the problem of forest loss.²

The primary international response to deforestation and land degradation has been the development of a mechanism to incentivise better forest management. The Reducing Emissions from Deforestation and Land Degradation (REDD+) mechanism has been the subject of intense negotiation and it has not yet been finalised. The essence of the mechanism is disarmingly simple: developed nations pay developing nations to keep their forests standing and well-managed. The carbon stored in these forests can then be sold on international carbon markets or used to offset other emissions.

Estimates of how much money can flow under this mechanism have reached as high as US\$30 billion.³ These funds can help improve forest management, reduce emissions, support sustainable development, and help to support biodiversity and ecosystem services.⁴

Forests are 'crowded, complex and contested spaces',⁵ where an array of voices compete to be heard in decision-making processes that are often taking place in distant places. The REDD+ mechanism will add new voices and new complexities to forest governance. A particular concern is the well-being of the people that live in these forests – customary land owners and Indigenous People – and the need to ensure the recognition and protection of their rights. Rosemary Lyster notes, '[o]ne of the crucial questions which emerges in the context of REDD+ is how the rights of Indigenous People and local communities will be protected'.⁶

The international aspects of negotiating a REDD+ mechanism have received considerable attention. Yet even in the absence of a clear international framework, implementation of REDD+ projects has commenced. The new voices are already speaking and threats to indigenous rights and customary land tenure are already materialising. In this context, it is important to consider the local ramifications of this nascent international mechanism.

This paper aims to explore the interaction between domestic legal frameworks implementing the REDD+ mechanism and customary land ownership by using the regulatory regime of Indonesia as a case study. The paper will analyse the domestic legal framework for land ownership, customary law and tenure, forestry and REDD+ in Indonesia, assessing how REDD+ projects interact with customary land ownership and indigenous rights under this framework.

The paper will begin with a brief overview of the REDD+ negotiations to date, including the negotiating text emerging from the recent meeting of the Conference of the Parties (hereafter COP) to the United Nations Framework Convention on Climate Change 1992 (hereafter UNFCCC) in Durban, South Africa (COP17). The paper will then

1 The estimate was previously thought to be around 18-20 per cent but new data suggests the proportion is lower. The figure of 12 per cent is applicable to forest loss; the total figure of 15 per cent includes land degradation. See G. van der Werf et al., 'CO₂ Emissions from Forest Loss' 2 *Nature Geoscience* 737 (2009).

2 See generally J. Eliasch, *Climate Change: Financing Global Forests* (United Kingdom: Office of Climate Change, 2008).

3 Spokesperson for the Center for International Forestry Research, quoted by Forest Carbon Asia, 'REDD+ Potential Funds Reach Up to US\$ 30 billion', available at www.forestcarbonasia.org/in-the-media/redd-potential-funds-reach-up-to-us-30-billion/.

4 See, for example, D. Brown, F. Seymour and L. Peskett, 'How Do We Achieve REDD Co-benefits and Avoid Doing Harm?', in A. Angelsen ed, *Moving Ahead with REDD: Issues, Options and Implications* (Bogor, Indonesia: Centre for International Forestry Research, 2008).

5 A. Babon, *Power, Politics and Participation in Reducing Emissions from Deforestation and Forest Degradation (REDD): A Case Study of Indonesia* (Canberra, Australia: Australian National University, Democratizing Climate Governance, 15-16 July 2010) [hereafter 'Babon'].

6 R. Lyster, 'REDD+, Transparency, Participation and Resource Rights: the Role of Law' 14(2) *Environmental Science and Policy* 118 (2010).

outline the ways in which REDD+ intersects with Indigenous People and customary land ownership, identifying Indigenous People as an essential component of a successful REDD+ mechanism, but also noting that REDD+ is a threat to Indigenous People and their customary land rights. Two types of threats will be discussed: the risk that Indigenous People will be excluded from the REDD+ governance process and the risks created by insecure tenure.

The key contribution of this paper is a detailed analysis of the domestic legal framework for REDD+ in Indonesia, exploring how the threats to Indigenous People and customary land ownership are entrenched at the domestic level. The paper concludes that very little security of tenure is provided to Indigenous People by Indonesia's domestic REDD+ legal framework and that this shortcoming is likely to result in poor protection of customary land rights under the REDD+ mechanism, regardless of the protection afforded by an eventual international agreement. In short, Indonesia's domestic legal framework is wholly inadequate to effectively implement REDD+ whilst also protecting the rights of Indigenous People.

Furthermore, this paper concludes that while full participation of Indigenous People is essential to an equitable REDD+ scheme, Indigenous People are unlikely to be protected unless land tenure reforms are undertaken as a matter of priority to ensure secure customary land tenure. Strong tenure must be used as the basis for the interaction of Indigenous People with the REDD+ mechanism.

2 REDD+

Reducing Emissions from Deforestation and Forest Degradation is broadly a mechanism which aims to ascribe a financial value for stored carbon in the world's forests and offer incentives for developing countries to reduce emissions from forested lands and invest in low carbon paths to sustainable development. The COP to the UNFCCC, at its 16th meeting at Cancun, Mexico, stated that it:

Encourages developing country Parties to contribute to mitigation actions in the forest sector by undertaking the following activities, as deemed appropriate by each Party and in accordance with their respective capabilities and national circumstances:

- (a) Reducing emissions from deforestation;*
- (b) Reducing emissions from forest degradation;*
- (c) Conservation of forest carbon stocks;*
- (d) Sustainable management of forests;*
- (e) Enhancement of forest carbon stocks⁷*

Activities (a) and (b) above are known as REDD while the latter activities constitute the 'plus' in the term REDD+. These activities and the proposed mechanisms under which they will be undertaken are both referred to as REDD+ in this paper.

2.1 From Bolivia to Durban

In January 1997, The Nature Conservancy and Fundación Amigos de la Naturaleza and the Government of Bolivia partnered with three energy companies to implement what is generally considered to be the world's first REDD-style project,⁸ though it would be another 10 years before this term is formalised at COP13 to the UNFCCC in Bali, Indonesia.

⁷ The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, Addendum Part Two: Action taken by the Conference of the Parties at its sixteenth session, Decisions adopted by the Conference of the Parties, Report of the Conference of the Parties on its sixteenth session, Cancun, November-December 2010, Doc. No. FCCC/CP/2010/7/Add.1, 70 (2010).

⁸ V. Holloway and E. Giandomenico, *The History of REDD Policy* 7 (Adelaide: Carbon Planet, 2009). The Noel Kempff Mercado Climate Action Project aimed to protect 1.5 million hectares of forest under threat from degradation, logging and agriculture. See The Nature Conservancy, 'Combating Climate Change in Bolivia: Protecting Forests to Reduce Global Warming: Noel Kempff Mercado Project Snapshot' (2007), available at <http://conserveonline.org/workspaces/climate.change/ClimateActionProjects/NoelKempff/ProjectProfile/NKProfileEnglish>.

The Kyoto Protocol to the UNFCCC was adopted in December 1997.⁹ Article 3 of the Kyoto Protocol states:

'The net changes in greenhouse gas emissions by sources and removals by sinks resulting from direct human-induced land-use change and forestry activities... shall be used to meet the [Kyoto commitments].'

Technical barriers relating to the verification of the amount of carbon stored in forests led to the restriction of REDD in the Marrakesh Accords (COP7 in 2001).¹⁰ As the carbon stored in forest could not be accurately verified, it was decided that developed countries should be permitted to undertake REDD activities to meet their targets, but that only projects involving afforestation and reforestation projects were to be permitted under the Clean Development Mechanism.¹¹

As the host of COP13 held in Bali in 2007, Indonesia keenly pressed for a clear work programme to resolve the outstanding issues that had previously caused REDD to fall off the map.¹² Decision 1/CP.13 (Para 1 (b) (iii)) called for '[p]olicy approaches and positive incentives on issues relating to [REDD +]'; and the role of conservation [etc.].¹³

COP15 held in Copenhagen, Denmark in 2009 led to the non-binding Copenhagen Accord, which acknowledged the role of REDD+ in climate mitigation

and agreed on the need for the 'immediate establishment of a mechanism including REDD-plus'.¹⁴

The most current draft text emerged from the Fourteenth Session of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) at COP 17 in Durban, South Africa in 2011.¹⁵ The Durban talks focused principally on REDD+ financing, reference levels and safeguards.¹⁶ The current text notes the need to respect the rights of Indigenous People and that their engagement is necessary for effective action.¹⁷ Importantly, the current text acknowledges the rights set out in the United Nations Declaration on the Rights of Indigenous Peoples 2007 (hereafter UNDRIP).¹⁸ However, there are concerns that safeguards in the current text are inadequate,¹⁹ and indigenous groups continue to call for a moratorium on REDD+. ²⁰

14 Decision 2/CP.15 (Copenhagen Accord), Addendum Part Two: Action taken by the Conference of the Parties at its fifteenth session, Report of the Conference of the Parties on its fifteenth session, Copenhagen, December 2009, UN Doc FCCC/CP/2009/11/Add.1, 6.

15 AWG-LCA, 'Amalgamation of draft texts in preparation of a comprehensive and balanced outcome to be presented to the Conference of the Parties for adoption at its seventeenth session', Durban, December 2011, UN Doc FCCC/AWG/LCA/2011/CRP.37.

16 See G. Silva-Chavez, 'REDD + Durban: Countries Agree on Key Issues' (Environmental Defense Fund, 2011), available at <http://blogs.edf.org/climatetalks/2011/12/06/redd-durban-countries-agree-on-key-issues/>.

17 AWG-LCA, 'Amalgamation of draft texts' (2011), note 15 above, para. 71.

18 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2 October 2007, A/RES/61/295, available at <http://www.unhcr.org/refworld/docid/471355a82.html>.

19 L. Aurora, 'REDD+ Draft Texts Postpone Financing Decision to 2012, Water Down Safeguards' (Bogor, Indonesia: CIFOR, 2001), available at <http://blog.cifor.org/5655/redd-draft-texts-postpone-financing-decision-to-2012-water-down-safeguards/>.

20 See Cultural Survival, 'Indigenous Peoples Say No to REDD+ and Durban Climate Agreement' (Cambridge, MA, USA: Cultural Survival, 2011), available at <http://www.culturalsurvival.org/news/none/indigenous-peoples-say-no-redd-and-durban-climate-agreement> and World People's Conference on Climate Change and the Rights of Mother Earth, 'Press release of the Global Alliance of Indigenous Peoples and Local Communities against REDD and for Life' (2011), available at <http://pwccc.wordpress.com/2011/12/06/press-release-of-the-global-alliance-of-indigenous-peoples-and-local-communities-against-redd-and-for-life/>.

9 Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 10 December 1997, 37 ILM 22 (1998).

10 The Marrakech Accords, UN Doc FCCC/CP/2001/13/Add.1-4 (2002). For a detailed analysis of the Marrakech Accords, see M. Vespa, 'Climate Change 2001: Kyoto at Bonn and Marrakech' 29 *Ecology Law Quarterly* 395 (2002).

11 IPCC, 'Special Report of the Intergovernmental Panel on Climate Change on Land Use, Land Use Change and Forestry' (IPCC, 2000) and E. Trines, 'Land-Use Change and Forestry in Future Climate Regimes: An Inventory of Some Options' (The Netherlands: Ministry of Agriculture, Nature and Food Quality, 2004).

12 See Babon, note 5 above at 6.

13 The semi-colon in this passage was changed to a comma by the 29th meeting of the Subsidiary Body on Scientific and Technical Advice (SBSTA) (Poznan, December 2008) and marked the final transition REDD+ by putting conservation and management (the '+') on a level footing with REDD activities.

3

REDD+, INDIGENOUS PEOPLE AND CUSTOMARY LAND OWNERSHIP

REDD+ intersects with customary land ownership in two key ways. On the one hand, as much of the forest land that will become part of REDD+ is customarily owned or occupied, REDD+ will be ineffective in the absence of the full participation of customary land owners. On the other hand, REDD+ may pose threats to customary land ownership where insecure land tenure or inadequate protection from state authority may make Indigenous People vulnerable to dispossession. Care must be taken to ensure that customary land owners give their free, prior and informed consent to decisions affecting their land, lest governments 'cheat' them out of the benefits that are rightfully theirs. These two aspects of the intersection between REDD+ and indigenous rights are outlined in the following section.

3.1 Customary Land Owners: Essential to REDD+ Effectiveness

The United Nations (hereafter UN) notes that REDD+ will need the 'full engagement and respect for the rights of Indigenous Peoples and other forest-dependent communities',²¹ while the Chair of the United Nations Permanent Forum of Indigenous Issues notes that efficacious REDD+ will come to fruition when Indigenous People are active participants in decision making processes and are allowed continued access to forests and their resources.²²

Much of the indigenous population of the world already practise sustainable forestry as they have historically relied on forestry resources for their livelihoods. As one briefing paper notes, '[t]hrough their age-old sustainable practices, Indigenous

Peoples have, in reality, been reducing emissions from deforestation and forest degradation as a result of sustainable forest and resource management practices'.²³ Traditional forest management practices have led to the conservation of forests and biological diversity. This conservation has contributed to improved soil fertility, prevention of soil erosion, an increase in vegetation cover, and enhanced watershed development and protection.²⁴

This knowledge, understanding and experience will be crucial in ensuring that the REDD+ mechanism actually works. Unfortunately, in its State of the World's Indigenous People Report, the UN notes that to date 'very few countries have included considerations regarding forest-related traditional knowledge in their forest policies'.²⁵ This has led to the marginalisation of Indigenous People in their homelands, conflict and poor resource management. In order to ensure that these mistakes are not repeated with REDD+, indigenous involvement is essential.

3.2 REDD+ as a Threat to Customary Land Owners

Forestry law already faces 'critical problems' in relation to Indigenous People, particularly the overlapping of logging concessions with, and illegal logging on, customary lands.²⁶ REDD+ has the potential to perpetuate many of these problems as well as the potential to alleviate them.

In the move to earn income from keeping forests standing, countries may exclude Indigenous People from their customary forests; dispossess them entirely; renew state control over the forests; exclude

21 See UN REDD Programme website, available at <http://www.un-redd.com/AboutREDD/tabid/582/Default.html>.

22 *Id.*

23 Asia Indigenous Peoples' Pact and the International Work Group for Indigenous Affairs, 'REDD+ and Indigenous Peoples: A Briefing Paper for Policy Makers' (Chiang Mai: Asia Indigenous Peoples' Pact and the International Work Group for Indigenous Affairs, 2010).

24 See Report of the Asia Summit on Climate Change and Indigenous Peoples Summit, Bali, February 2009 (Baguio City, Philippines: Tebtebba Foundation 2009).

25 United Nations Department of Economic and Social Affairs, *State of the World's Indigenous Peoples* 90 (New York: United Nations, 2009).

26 *Id.*, Chapter 3.

Indigenous People from decision-making; and, take a top-down approach to forest governance.²⁷

Recognising that REDD+ potentially threatens their land, rights and livelihoods, the Indigenous Peoples Global Summit on Climate Change adopted the Anchorage Declaration, which calls for full and effective participation of Indigenous Peoples in REDD+ decision making and recognition of indigenous self-determination. The Anchorage Declaration states:

*All initiatives under Reducing Emissions from Deforestation and Degradation (REDD) must secure the recognition and implementation of the human rights of Indigenous Peoples, including security of land tenure, ownership, recognition of land title according to traditional ways, uses and customary laws and the multiple benefits of forests for climate, ecosystems, and Peoples before taking any action.*²⁸

3.3 Participation in REDD+ Governance

The participation of Indigenous People in REDD+ governance processes is important to ensure that they are not marginalised at the local level as a result of the international climate change mitigation process. The Indigenous Peoples' Caucus at the Bangkok meeting²⁹ agreed on three key principles to ensure that Indigenous People are not marginalised by REDD+. There are:³⁰

1. UNDRIP must constitute a minimum standard of protection for Indigenous People;
2. Free, prior, informed consent is fundamental to REDD+ governance; and
3. Traditional knowledge must be recognised.

International law has recognised the essential nature of indigenous consultation and participation through UNDRIP and its free, prior and informed consent (hereafter FPIC) concept. Article 19 of UNDRIP states:

'States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.'

Article 32.2 pronounces:

'States shall consult and cooperate in good faith with the Indigenous Peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources...'

Clearly then, international law is moving towards increased consent and cooperation, acknowledging the rights of Indigenous People. While there is no international agreement on REDD+, the principles adopted by UNDRIP set the benchmark for the protection of Indigenous People and they have been included in the current text for REDD+. In assessing Indonesia's domestic legal framework for REDD+, it will therefore be apposite to enquire as to whether these standards have been met.

3.4 Tenure Security

Tenure security lies at the heart of the debates surrounding REDD+ and customary land ownership and it is of vital relevance and importance to understand the relationship between REDD+ and Indigenous People. Tenure security is widely

²⁷ See V. Tauli-Corpuz, 'REDD Plus and Indigenous Peoples: Opportunities and Risks' (Rome: International Fund for Agricultural Development, 2010).

²⁸ *The Anchorage Declaration*, Indigenous Peoples Summit on Global Summit on Climate Change (2009), available at <http://www.indigenoussummit.com/servlet/content/declaration.html>.

²⁹ Seventh Session of the AWG-LCA, Bangkok, 28 September 2009.

³⁰ International Forum on Globalisation, 'Ensuring Indigenous Peoples' and Forest-Dependent Communities' Rights in REDD (Reducing Emissions from Deforestation and Forest Degradation), Strategy Session, Summary Report and Recommendations' (Washington DC: International Forum on Globalization, 2009).

identified as one of the key factors in the success or failure of REDD+; yet it may also be threatened by moves to make money from forest carbon.³¹

The extensive literature regarding REDD+ identifies many risks relating to insecure tenure and poor protection of the rights of customary land owners and occupiers. Indigenous People are vulnerable as they have weaker bargaining position and less influence over the REDD+ process, particularly in relation to negotiations with governments.³² The increased value of forests due to REDD+ can bring large incomes for governments, which may in turn become more controlling in order to secure this income. Traditional 'command and control' measures could exclude Indigenous People from forests and governance processes.

Poorly delineated and insufficiently protected tenure will make it difficult to fairly and accurately distribute the financial benefits accrued under the REDD+ mechanism. There is a risk that Indigenous People will not be compensated adequately for their participation in REDD+ projects, the loss of their traditional land, or even for the jobs lost in the forest sector due to restrictions on forest use.³³

The framework document of the UN-REDD programme calls for support to promote the reform of the land tenure system,³⁴ and the 2001-2015 UN-

REDD Programme Strategy advocates the integration of REDD+ into the broader sustainable development agenda, including improving land tenure systems.³⁵

One extensive study into the relationship between land tenure and REDD+ concluded that:

*'Effective local institutional capability, and the knowledge and preparedness to put good forestry into practice, will be essential for REDD... effective and equitable local property rights are needed.'*³⁶

Given these concerns, individual countries must be assessed for their recognition of customary land ownership and the protection of the accorded rights. The case study outlines the arrangements for customary ownership in Indonesia.

4

CASE STUDY: INDONESIA

Indonesia has the world's fifteenth largest economy,³⁷ fourth largest population,³⁸ and a land area of about 1,904,569 million square kilometres,³⁹ including around 100 million hectares of forest⁴⁰. In order to assess whether the domestic legal

31 Note that insecure tenure itself is also a cause of deforestation and degradation, clearing of land often being a way to signify a claim of possession. See L. Cotula and J. Mayers, 'Tenure in REDD: Start-point or Afterthought?' (London: IIED, 2009) [hereafter 'Cotula and Mayers'] and D. Sunderlin, M. Larson and P. Cronkleton, 'Forest Tenure Rights and REDD+: From Inertia to Policy Solutions' in A. Angelsen ed, *Realising REDD+. National Strategy and Policy Options* (Bogor, Indonesia: CIFOR, 2009).

32 See Brown, Seymour and Peskett, note 4 above and Cotula and Mayers, note 31 above.

33 A. Vatn and P. Vedeld, *Getting Ready! A Study of National Governance Structures for REDD+* (Aas, Norway: Department of International Environment and Development Studies, Norwegian University of Life Sciences UMB, 2011).

34 FAO, UNDP and UNEP, 'UN Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries: framework document' (2008), available at http://www.unredd.net/index.php?option=com_docman&task=doc_download&gid=4&Itemid=53.

35 UN-REDD, 'The UN-REDD Programme Strategy 2011-2015' (Geneva: UN-REDD, 2011).

36 See Cotula and Mayers, note 31 above.

37 This is measured by GDP based on purchasing-power-parity. See IMF, *World Economic and Financial Surveys, World Economic Outlook Database*, available at <http://www.imf.org/external/pubs/ft/weo/2011/02/weodata/index.aspx>.

38 See CIA World Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2119rank.html>.

39 See CIA World Factbook, available at <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2147rank.html>.

40 For a discussion on the calculation of Indonesia's forest resources, see A. Contreras-Hermosilla and C. Fay, *Strengthening Forest Management in Indonesia through Land Tenure Reform: Issues and Framework for Action 2-4* (Washington DC: Forest Trends, 2005).

framework in Indonesia will empower or marginalise Indigenous People in the implementation of REDD+, this section outlines the country's legal history and provides an analysis of customary land ownership as well as discusses Indonesia's land law, forestry law, and laws relating specifically to REDD+.

Legal history is of interest due to the impact of Indonesia's colonial past on the present day legal system, particularly with regard to the integration of traditional and customary legal systems. Indonesia has struggled to reconcile its colonial past with its indigenous past and present. Land law and customary ownership are of paramount importance as they define the rights of customary owners and therefore set the underlying framework for the integration of REDD+ with the existing legal system.

Forestry law is of interest because projects undertaken under the auspices of the REDD+ mechanism are essentially a type of forestry project. Both traditional forestry and REDD+ projects involve payment for the utilisation of forest resources: the resource in the former case are the trees themselves whereas in the latter case, it is the carbon they store. In both cases there is a risk that inadequate legal protection for customary land owners could threaten their rights and tenure. Forestry law remains relevant even though Indonesia has implemented specific REDD+ regulation. Existing forestry law provides the foundation for the entire regulatory system. Finally this section will discuss Indonesia's REDD+ laws.

4.1 Indonesian Law

Indonesian law is based on a civil law system incorporating elements of customary law and Dutch law. Prior to colonisation by the Dutch in the sixteenth century, Indonesia was ruled by numerous independent indigenous kingdoms, each with their own customary laws. Following independence in 1945, Indonesia started to develop its present legal system, infusing new laws with the precepts and concepts of existing laws. As such, customary law known as *adat* law remains a part of the modern Indonesian legal system.

4.1.1 Land Law

The development of land law in Indonesia is inextricably linked to its colonial past. Prior to 1960, land law was marked by dualism between the colonial legal system, designed to meet the capitalistic interests of the colonial government, and the various customary systems. These customary systems were not uniform in nature, though a common thread was the notion that land was a spiritual or social good and should be community-owned rather than being conceptualised as an economic commodity.⁴¹

The enactment of the Basic Agrarian Law (hereafter BAL)⁴² was intended to bridge the gap between 'Western' law and customary law by providing for registration of individual land rights while also continuing to recognise customary land law concepts and institutions. The preamble to the BAL states: 'agrarian law is dualistic in nature, given that *adat* (customary) law is also effective in addition to the former [legal system], which is based on western law'.

While Dutch land law inevitably favoured the development of capital interests, independence ushered in a different perspective. Article 33.3 of the Constitution of Indonesia,⁴³ which was influential in guiding the underlying foundations of BAL, states:

'The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.'

While Article 33.3 of the Constitution introduces a more socialist perspective to Indonesian land law, it

41 E. Heryani and C. Grant, 'Land Administration in Indonesia', 3rd FIG Regional Conference, Jakarta, 3-7 October 2004.

42 Indonesia, *Undang-undang Pokok Agraria*, Law Number 5 of 1960 [hereafter 'BAL']. Despite being called the Basic Agrarian Law, BAL regulates *all* land.

43 Indonesia, *The 1945 Constitution of the Republic of Indonesia, As amended by the First Amendment of 1999, the Second Amendment of 2000, the Third Amendment of 2001 and the Fourth Amendment of 2002*, available at <http://www.embassyofindonesia.org/about/pdf/IndonesianConstitution.pdf>.

also introduces the ‘eminent domain’ concept whereby the right to control land is vested in the State. This means that customary land rights (*ulayat*) are not guaranteed by BAL without further clarification.

BAL created an array of categories of land rights, including *Hak Milik*, which closely approximates to the common law concept of freehold title, *Hak Guna Bangunan*, which enables building on land, and forestry rights (*Memungut Hasil Hutan*).

4.1.2 Customary Land Ownership

BAL was intended to be a system of land law based on *adat* land law,⁴⁴ and *adat* is mentioned several times in BAL. For example, Article 2.4 states that the State’s control over land ‘can be delegated... to Autonomous Regions and to *adat*-law communities’. However, while BAL provides general principles recognising *adat*, BAL is ‘basic law’ and requires implementing legislation to give substantive effect to its provisions. Despite the fact that BAL has now been in existence for over 45 years, only a handful of implementing regulations have been introduced, none relating to *adat* specifically. Without such implementing regulations, *ulayat* occupies an uncertain and unprotected position.

A People’s Assembly Decision regarding human rights,⁴⁵ and a Human Rights Act,⁴⁶ professed to recognise and protect *adat* communities and their *ulayat* rights, which perhaps gives some cause for hope. Unfortunately, Indonesian forestry legislation passed shortly after the Human Rights Act disregards this recognition, compounding previous failures to protect *ulayat* rights in the forestry context.

4.1.3 Forestry Law

A number of sector-specific legislation and regulations followed BAL. These include the Forestry Act 1967 (hereafter the 1967 Act),⁴⁷ and

an implementing regulation,⁴⁸ as well as legislation regarding mining and other land activities. The 1967 Act was subsequently deemed to ‘no longer [be] compatible with the principles of forest control and administration and with current development’,⁴⁹ and was replaced by a new Forestry Act in 1999.⁵⁰

Far from clarifying and protecting *ulayat* rights, the 1967 Act and the New Forestry Act have further marginalised *adat* communities. The 1967 Act was intended to improve economic growth and stimulate development through the exploitation of Indonesia’s abundant forest resources. The 1967 Act increased exploitation and facilitated the issuance of large forestry concessions to corporations: in its wake, income from logging increased by up to 2,800 percent. In 1967, four million cubic meters of timber were extracted, the majority for domestic use, but ten years later this had increased to 28 million cubic meters, a majority of which was exported.⁵¹

As the 1967 Act has been subsumed by the New Forestry Act, it is the latter that will be discussed here. However, the New Forestry Act takes more or less the same position as the 1967 Act in relation to *ulayat* rights in forests; neither does much to recognise or protect *ulayat* rights. The New Forestry Act splits forest ownership into two categories: state and proprietary. State Forest is defined by Article 1.4 simply as ‘forest located on lands bearing no ownership rights’ while Article 1.5 defines Proprietary Forest as ‘forest situated on a piece of land covered by proprietary rights’, such as those mentioned above.

The New Forestry Act confirms that forests formerly controlled by *adat* law communities are included in the ‘State Forest’ category. This means

⁴⁴ BAL, Preamble, note 42 above.

⁴⁵ Indonesia, Decree of the People’s Consultative Assembly of the Republic of Indonesia on Human Rights, Decree No. XVII/MPR of 1998.

⁴⁶ Indonesia, Act Concerning Human Rights, Act No. 39 of 1999.

⁴⁷ Indonesia, Forestry Act, Act No. 5 of 1967.

⁴⁸ Indonesia, Government Regulation concerning Right of Forest Exploitation and the Right to Harvest Forest Products, Regulation No. 21 of 1971.

⁴⁹ Indonesia, Forestry Act, Act No. 41 of 1999, Preamble (d) [hereafter ‘New Forestry Act’].

⁵⁰ *Id.*

⁵¹ A. Sangaji, ‘Orang Katu di Behoa Kakau: Korban Politik Konservasi, makalah, tidak’ (2000) cited in M. Safitri and R. Bosko, *Indigenous Peoples/Ethnic Minorities and Poverty Reduction – Indonesia 17* (Manila: Environment and Social Safeguard Division, Regional and Sustainable Development Department, Asian Development Bank, 2002).

that *adat* communities do not own or control the forests in which they live. Using the ‘eminent domain’ concept, the New Forestry Act defines *Adat* forest as ‘State Forest situated in the territory of adat community’.⁵²

Article 37 states, in relation to *adat* forest, that:

1. *Utilisation of “adat” forest shall be undertaken by concerned customary communities, in accordance with the forest’s function.*
2. *Utilisation of “adat” forest with protection and conservation functions shall be undertaken as long as it does not disturb those functions.*

Article 6 declares that forests have three functions: conservation, protection, and production. The State is empowered to classify forests according to these functions. It is at this point that the significance of land and forestry laws in relation to customary ownership in the context of REDD+ becomes apparent.

Under the New Forestry Act, if the State wishes to set up a REDD+ project, it can designate swathes of State forest as ‘protection forest’ or ‘conservation forest’ under Article 6. Customary land occupiers will then be unable to: (1) utilise their traditional lands insofar as this utilisation may conflict with the REDD+ project, and (2) implement REDD+ themselves as they have no ownership rights over the forest which they occupy.

Given the potential for disenfranchisement of Indigenous People under Indonesian land and forestry laws, it is hoped that a specific REDD+ regulation is implemented to ensure the rights of Indigenous forest-dwellers.

4.1.4 REDD+ Law

Indonesia has been one of the ‘first off the block’ in establishing specific laws regarding REDD+. Indonesia’s swift establishment of specific REDD+

laws is perhaps unsurprising. In 1967, Indonesia scrambled to unsustainably chop down its forests to generate income, yet REDD+ enables countries to generate income by doing precisely the opposite. It is therefore understandable that Indonesia and other forested nations want to facilitate the rapid uptake of REDD+ projects.

However, laws established in such a reactionary manner are likely to be inadequate and defective. For the present purpose, the key question is whether Indonesia’s REDD+ laws and regulations address the two problems set out in the previous paragraph: (1) does Indonesia’s REDD+ framework protect customary occupiers?; and (2) does it allow them to partake in REDD+ governance and implementation?

REDD+ laws in Indonesia consist of two regulations and one decree issued by the Ministry of Forestry. These are:

- Regulation No. 68 of 2008 on Demonstration Activities of REDD (hereafter the Demonstration Regulation);
- Regulation No. 30 of 2009 on the Implementation Procedures of Reducing Emission from Deforestation and Forest Degradation (hereafter the Implementation Regulation); and
- Decree No. 36 of 2009 on Procedures for Licensing of Commercial Utilisation of Carbon Sequestration and/or Storage in Production and Protected Forests (hereafter the Licensing Decree).

The Demonstration Regulation provides for five year demonstration projects to be implemented by ‘proponents’ (that is, government, forest timber license holders, holders and managers of right forests, managers of customary forest) who can be assisted by ‘partners’ (government, international organisations, private entities, individuals), with the aim of testing and developing methodologies, technology and institutions.⁵³

⁵² New Forestry Act, note 49 above, Article 1.6. The explanatory memorandum to the Act states, ‘The inclusion of forests controlled by *adat* communities into the category of state forest is because of the existence of the right of control by State’ (emphasis added).

⁵³ H. Scheyvens, ‘REDD Strategy and Regulation: Learning from the Indonesian Experience’ (Tokyo: Institute for Global Environmental Strategies, Forest Conservation, Livelihoods and Rights Project, 2010) [hereafter ‘Scheyvens’].

The Implementation Regulation is a more substantive regulation dealing with REDD+ projects of 30 years' duration. It allows national and international entities⁵⁴ to be 'REDD implementers'. The implementer holds the right to trade the carbon credits created by REDD+ activities. The Implementation Regulation allows flexibility for the system to be changed to align with any future international agreement on REDD+.⁵⁵

The Demonstration Regulation and the Implementation Regulation define REDD+ projects as an 'environmental service', the exploitation of which requires a licence. The Licensing Decree sets out the detail of these licences and how carbon credits are to be marketed, including provisions relating to the verification of emissions reduction. Most significantly for the present purpose, the Licensing Decree also details how the monetary income from REDD+ projects is to be distributed in relation to different types of forests.⁵⁶

4.1.4.1 Adat Communities in the REDD+ Decrees

Just as the international draft text on REDD+ has failed to strongly assert the rights of Indigenous People, the Indonesian REDD+ regulations and decrees have paid scant attention to the involvement of *adat* communities in the REDD+ process.

The Implementation Regulation stipulates that REDD+ projects taking place on customarily occupied forest land require a recommendation from the regional government authorities. While this has the potential to offer some protection to customary occupiers, in reality the local level government authorities will often be subject to the same influences and drivers as those at the national level.

The Implementation Regulation also bars customary occupiers of forests from developing REDD+ projects themselves. Only regional, national and international entities are allowed to implement

projects. Even if this were to be changed in light of future international developments, the Implementation Regulation currently requires the implementer to prove a *legal* connection to the forest that is to be the subject of a REDD+ project,⁵⁷ a condition that traditional custodians of the forest will be unable to satisfy due to the lack of recognition of their customary property rights. This is clearly contrary to Article 29.1 of the UNDRIP, which states:

'Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.'

The one area where there is some hope is the Licensing Decree which stipulates that 70 percent of the income from REDD+ projects in *Hutan Adat* (Customary Forest) is to be allocated to the community, while 10 percent and 20 percent will be distributed to the Government and the developer respectively.⁵⁸ This is indubitably a step in the right direction though the strong nature of the Decree must be followed up with strong adherence and enforcement. Whether this is likely to occur is questionable. Furthermore, without strong customary land tenure, it may be difficult to determine who the community actually is, risking placing the financial benefits in the hands of local elites and officials rather than the community as a whole.

4.2 The Framework in Practice: the Indonesia-Australia Forest Carbon Partnership

The Indonesia-Australia Forest Carbon Partnership was established in June 2008. Initially Australia committed AU\$40 million to assist Indonesia in developing its participation in REDD+, which incorporated AU\$30 million for the Kalimantan Forests and Climate Partnership demonstration activity and a bilateral package of AU\$10 million supporting capacity building relating to the technical

⁵⁴ Regional governments can propose and coordinate REDD+ projects subject to agreement with national entities.

⁵⁵ See Scheyvens, note 53 above.

⁵⁶ *Id.*

⁵⁷ N. Masripatin, 'REDD Indonesia: Progress to Date' (Bogor, Indonesia: Forestry Research and Development Agency, Ministry of Forestry and Center for Clean Air Policy and Carbon and Environmental Research, 2009).

⁵⁸ See Scheyvens, note 53 above.

aspects of implementing REDD+. ⁵⁹ The figure now is approximately AU\$100 million. ⁶⁰

The Kalimantan Forests and Climate Partnership is the first large-scale REDD+ demonstration project in Indonesia, implementing REDD+ on 120,000 hectares of forested and degraded tropical peatland in Central Kalimantan, Borneo. Encouragingly the project allows for 'incentive based payments for forest-dependent communities'. ⁶¹ However, besides a simple factsheet produced by AusAID, detailed documentation relating to the project is unavailable.

A Friends of the Earth report analysed documentation for the project and found that '[n]one of the Kalimantan documents mention the necessity of recognising rights of local peoples, and particularly [FPIC]'. ⁶² Of course, it is arguable that it is not the role of Australia to protect Indonesia's Indigenous People and that it is for domestic law to play this role in REDD+. Unfortunately, as has been seen, domestic law is not doing this effectively.

The Kalimantan project is aiming to develop legally enforceable rights to sequestered carbon based on Indonesian forestry law. ⁶³ Again this is problematic as domestic law is not effectively protecting indigenous rights. As one NGO put it:

'since [Indonesian forestry law] fails to protect the rights of indigenous communities... Australia's funding for REDD means support for the continuation of an unjust forest management regime which has systematically

marginalised forest communities and violated their rights to land and resources.' ⁶⁴

This paper began by noting the complexity of forests and the Central Kalimantan region is a prime example. Through a diverse local history - Dutch colonisation, open access to customary land, Suharto's 'Mega Rice' projects, and now REDD+ - Central Kalimantan has become a hotbed of power struggles and competing claims over rights to forests and their carbon, all compounded by a lack of legal clarity. ⁶⁵

Against this background, REDD-Monitor, an independent blog monitoring REDD+ projects worldwide, received two statements from a local group in relation to the project. The first stated that Indigenous People in the area were against the project, ⁶⁶ while the second, sent only a month later by the same group, retracted the earlier statement simply saying it was 'not true'. ⁶⁷ This may seem strange, perhaps a little amusing, but it highlights the complexities of forests. It is thought that the first letter was driven by an Australian NGO and the second by the Kalimantan project managers.

In June 2011, the Central Kalimantan Chapter of the Indigenous People Alliance of the Archipelago issued a 'Statement of Concern' (which, as yet, has not been retracted) calling for a moratorium on REDD+ projects. ⁶⁸ The Statement expressed concern about many aspects of REDD+ projects in the region including: lack of transparency; complete ignorance of FPIC; lack of involvement in decision-making; poor governance and weak state capacity in the region; and conflict between national, provincial and local regulations and authorities. ⁶⁹

⁵⁹ AusAID, 'Indonesia-Australia Forest Carbon Partnership Factsheet' (Canberra, Australia: AusAID, 2009) [hereafter 'AusAID'].

⁶⁰ See C. Lang, 'Stop the Indonesia-Australia REDD+ Project: Indigenous Peoples' Opposition to the Kalimantan Forests and Climate Partnership', REDD-Monitor (2011), available at www.redd-monitor.org/2011/06/15/stop-the-indonesia-australia-redd-project-indigenous-peoples-opposition-to-the-kalimantan-forests-and-climate-partnership/ [hereafter 'Lang'].

⁶¹ See AusAID, note 59 above.

⁶² *Id.*

⁶³ Government of Indonesia and Government of Australia, 'Reducing Emissions from Deforestation and Forest Degradation in Developing Countries', Joint submission to the AWG-LCA, AWG-KP and SBSTA, 5 (2008).

⁶⁴ 'REDD Concerns Deepen', 82 *Down to Earth Newsletter* (September 2009), available at <http://dte.gn.apc.org/82acl.htm>.

⁶⁵ G. Galudra et al., 'Hot Spots of Confusion: Contested Policies and Competing Carbon Claims in the Peatlands of Central Kalimantan, Indonesia' (Indonesia: Alternatives to Slash-and-Burn Partnership for the Tropical Forest Margins, 2010).

⁶⁶ See Lang, note 60 above.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See Lang, note 60 above.

There is a bitter irony here: Norway and Indonesia agreed on a moratorium on logging as part of a separate REDD+ deal;⁷⁰ now Indigenous People are demanding the same for REDD+.

4.3 Customary Ownership and REDD+ in Indonesia: An Assessment

The United Nations Committee on Racial Discrimination has written to the Indonesian Government to express concerns that the REDD+ regulations do not respect the rights of Indigenous People,⁷¹ and overall, this appears to be a fair assessment. While the Licensing Decree suggests that money may flow to customary occupiers of forests, there remains uncertainty of tenure, a lack of consultation and an all-round lack of recognition and protection of the rights of Indigenous People.

The Australian REDD+ project confirms that the rushed nature of the REDD+ regulations and the weak nature of land and forestry law and governance are a threat to customary land ownership. Thorough and comprehensive education, consultation and participation are required if REDD+ projects are to be legitimate and are to be seen as being legitimate. Indigenous People's rights to their land must be protected and not treated as either an unfortunate inconvenience or a campaigning tool.

In addition, Freedom House states: 'corruption, collusion, and nepotism continue to constitute the modus operandi of Indonesian politics' despite some improvements over recent years.⁷² This is likely to pose a huge challenge to the legitimacy of any REDD+ project. If governance arrangements for REDD+ are to be transparent with a high level of accountability and participation, corruption must be curtailed. A combination of weak legal protection and corrupt enforcement may well sound the death

knell for customary land rights over forests in regions earmarked for REDD+ projects.

5

MAKING REDD+ WORK FOR INDIGENOUS PEOPLE: LESSONS LEARNED

The first key lesson to be learned from the analysis of the legal framework for REDD+ in Indonesia is that outlining the protection for customary land owners in a REDD+ mechanism at the international level will be meaningless without equally strong rights at the domestic level, both nationally and locally. The problems with Australia's REDD+ project in Indonesia suggest that in the absence of robust domestic laws, REDD+ is likely to add a further layer of complexity and confusion to an already contested and sensitive space without bringing real benefits to any of the key stakeholders.

The second key lesson is that the most crucial reforms are land tenure reforms. Secure tenure must be seen as a prerequisite to effective REDD+ that is sensitive to indigenous rights. Indonesia's lack of recognition of customary land rights and concomitant weak legal protection makes it difficult to imagine how the other necessary protections such as participation in governance and sharing the monetary benefits will be achieved. Without security of tenure, Indigenous People will have to rely on domestic authorities and foreign governments to protect their interests. This leaves Indigenous People in a precarious situation as the interests of those actors are not generally aligned with their own.

A comprehensive study of land tenure and REDD+ in general, mentioned previously, concluded that land tenure should be the foundation of REDD+.⁷³ The need to prioritise land tenure reform is borne out by the analysis in this paper.

70 See 'Norway-Indonesia REDD+ Partnership - Frequently Asked Questions', available at www.norway.or.id/Norway_in_Indonesia/Environment/-FAQ-Norway-Indonesia-REDD-Partnership-.

71 'Indonesia: REDD Project - Many Threats, No Solution', 153 *World Rainforest Movement Bulletin* (2010).

72 'Country Report - Indonesia', in Freedom House, *Countries at the Crossroads 2010 1-2* (Washington DC: Freedom House, 2010).

73 See Cotula and Mayers, note 31 above.

Third, specific regulations must be adopted that detail not only the 'commercial' side of a REDD+ project but also address how FPIC is to be obtained, how Indigenous People will participate in REDD+, and how the financial benefits will reach them. As Indonesia's REDD+ regulations show, it is not sufficient to rapidly promulgate laws that lack substance to ensure that REDD+ is both effective and equitable.

The fourth lesson learned is that the strength of underlying governance is crucial to ensure that customary land rights are protected under a REDD+ mechanism. Improvements in land tenure security and REDD+ regulation are unlikely to be enough to achieve effective REDD+ and fairness for customary land owners and occupiers if they are undermined by widespread corruption and poor governance. While this issue is beyond the scope of this paper, it is a pressing one in many areas of environmental governance and it must be addressed.

A final consideration relates to strategies for improving the interaction between REDD+ and Indigenous People. Given that the interests of Indigenous People are not aligned with those of the actors implementing REDD+ and that corruption and poor governance is widespread, it may be questioned whether and how the interaction can be improved. As Cotula and Mayers note, tackling some of the 'powerful players behind deforesting activities', including corporations, self-interested foreign and local governments and corrupt officials, 'will require concerted action on an unprecedented scale'.⁷⁴

Developed countries have a responsibility, enshrined in international climate change law as the concept of 'common but differentiated responsibilities', to bear a greater share of the burden for mitigating climate change. It is simply not acceptable for a developed nation to defer to the national authorities of developing countries in the protection of Indigenous People under a REDD+ mechanism. While this paper does not advocate that developed countries should dictate domestic laws in developing countries, it is submitted that developed countries

seeking to take advantage of the REDD+ mechanism owe a duty to ensure that they do not finance REDD+ projects until adequate safeguards are in place to ensure that REDD+ will not prejudice Indigenous People.

As a starting point, developed countries must rethink their aid and investment strategy. Before implementing REDD+ projects, they must shift their focus to improving tenure security, increasing participation, strengthening governance, and eradicating corruption. Only then can REDD+ be both effective and sensitive to the interests of Indigenous People and their customary land ownership rights.

⁷⁴ *Id.*, at vi.

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